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No. 93-288

In the

# Supreme Court of the United States

October Term, 1993

Exxon Corporation, the BF Goodrich Company, Union Carbide Corporation, and Monsanto Company,
Petitioners,

v.

Susan B. Boyle, Administrator of the New Jersey Spill Compensation Fund, et al.,
Respondents.

**On Petition For a Writ Of Certiorari To The Appellate Division Of The New Jersey Superior Court**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Are petitioners entitled to have this matter reviewed by this Court a second time when the New Jersey Courts have given full effect to the mandate of this Court in Exxon v. Hunt, 475 U.S. 355 (1986), by requiring the State Legislature to reimburse the Spill Fund for expenses partially preempted by Superfund, a remedy which is entirely consistent with this Court's later ruling in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), that a "clear and certain" remedy be provided for a tax scheme ultimately found to be partially unconstitutional?

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## COUNTERSTATEMENT OF THE CASE

Petitioners seek yet another writ of certiorari to review the issues of severability and remedy for a partially preempted state tax that this Court previously considered in Exxon v. Hunt, 475 U.S. 355, 376 (1986), and remanded to state court to be determined according to state law. This latest incarnation of petitioners's argument arises not only from their second challenge to the remedy devised by the Supreme Court of New Jersey in Exxon v. Hunt, 109 N.J. 110, 534 A.2d 1 (1987), mandamus denied 485 U.S 975 (1988), but also from the February 22, 1993, decision of the Appellate Division of the Superior Court of New Jersey in Exxon Corp. v. Hunt, 620 A.2d 1068, 262 N.J. Super. 264 (App. Div. 1993), certif. denied 133 N.J. 445 (N.J. 1993). This most recent decision found that this Court's holding in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), did not require a modification of the remedy fashioned by the New Jersey Supreme Court, pursuant to the remand of this Court, for expenditures found to have been partially preempted by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. 9614(c) (1983).

### 1. The State and Federal Statutory Schemes.

New Jersey's Spill Compensation and Control Act, ("Spill Act"), N.J.S.A. 58:10-23.11 et seq. (1992), took effect in 1977, more than three full years before Congress addressed similar cleanup and funding issues in CERCLA. The Spill Act imposed a tax on major petroleum and chemical facilities to generate revenues to be credited to the Spill Fund for use in financing the prevention and cleanup of hazardous discharges within the state. N.J.S.A. 58:10-23.11f, g, h. As adopted, the Spill Act authorized Spill Fund expenditures for several purposes: 1) to finance governmental cleanup of hazardous waste, including oil spills; 2) to reimburse innocent third parties for cleanup costs; 3) to compensate innocent third parties for damage

resulting from oil spills or other discharges of hazardous wastes; 4) to pay personnel and equipment costs; 5) to administer the Spill Fund; and 6) to conduct research.

In December of 1980, CERCLA took effect, imposing a tax on certain petroleum and chemical products to be credited along with appropriations from general revenues to a trust account known as "Superfund." These moneys were made available to finance federal cleanups of hazardous waste sites, although oil spills were beyond the statutory coverage, as was a mandatory state share of at least 10% of remedial costs. 42 U.S.C. §§9601, 9604, 9611. Superfund financing for cleanups was further limited to those purposes designated by the United States Environmental Protection Agency ("USEPA") in the National Contingency Plan ("NCP"), which included the National Priority List ("NPL"), a compilation of the worst sites nationwide. 42 U.S.C. §§9604, 9605, 9611; 40 C.F.R. §300.1 et seq. (1989). As even a quick comparison of CERCLA and Spill Fund's authorized uses shows, there were areas where state coverage exceeded that available from Superfund as well as areas of overlap.

**2. This Court's Decision in Exxon v. Hunt.**

As originally enacted, CERCLA contained a preemption clause, §114(c), which stated in pertinent part that, "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Congress removed this preemption clause from the statute in the Superfund Amendments and Reauthorization Act ("SARA"), P.L. 99-499, signed into law by the President on October 17, 1986. Based on the original §114(c), however, petitioners instituted litigation in the Tax Court of New Jersey seeking the total preemption of the New Jersey Spill Tax and refunds of all of the taxes

they had paid into the Spill Fund since the effective date of CERCLA. After each of three successive New Jersey courts upheld the Spill Tax, 4 N.J. Tax 294 (1982); 190 N.J. Super. 131, 462 A.2d 193 (App. Div. 1983); 97 N.J. 526, 481 A.2d 271 (1985); petitioners sought and obtained review from this Court.

This Court held that §114(c) of CERCLA preempted in part the New Jersey Spill Act. Exxon Corp. v. Hunt, 475 U.S. at 358. The issues addressed by the Court were the meaning and scope of CERCLA's preemption clause, and the preemptive impact of that statutory construction on the New Jersey Spill Fund. 475 U.S. at 363-364. After recognizing that §114(c) was "not a model of legislative draftsmanship," 475 U.S. at 363, the Court concluded that the meaning of the provision could be ascertained only by reference to the remainder of CERCLA. Id. In scrutinizing the balance of the statute, the Court's primary focus was on categories of expenditure -- those categories covered by CERCLA for which compensation from Superfund was available.

After analyzing CERCLA, this Court concluded that the NCP provided the criteria to determine "what expenses, at which sites, will be eligible for Superfund money." 475 U.S. at 374-375. As noted by the Court, the NCP specified that removal actions, or immediate cleanups, would be financed by Superfund only in emergency situations. 40 C.F.R. §300.65(b). Remedial actions consistent with permanent remedies would be financed only for sites nominated by USEPA to the NPL, the list of the worst sites nationwide. 40 C.F.R. §300.68(a). The Court thus used these regulatory parameters to define the categories of cleanup expenses "which may be compensated" by the Superfund, and which, according to the Court's interpretation of §114(c), could not properly be duplicated as categories of expenditures from special state funds. 475 U.S. at 376. Even these parameters were not all-inclusive

as to the scope of preemption, however, because the Court found that the state share of 10% or more of remedial costs mandated by CERCLA as a prerequisite for Superfund action could not be compensated by Superfund. Consequently, federal preemption under §114(c) did not extend to state fund financing of the state share of remedial costs.

The Court then applied this analysis to the Spill Act, concluding that the purposes of the state enactment were preempted only to the extent that they permitted "expenditures" beyond the state share "for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP...." 475 U.S. at 376 (emphasis added). Notably, this Court did not craft a remedy for this partial preemption, but remanded the case to the New Jersey Supreme Court to decide "the state-law question whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." Id. The remand thus left the nature of the remedy to the state courts, which is completely consistent with the precedents of this Court that repeatedly recognize the flexibility accorded to state courts to design remedies in the taxing area.

### 3. The New Jersey Court Proceeding on Remand.

After receiving this mandate, the Supreme Court of New Jersey, in turn, remanded the case to the Tax Court "to develop a record and make such recommended findings and calculations as may be determined to be necessary to implement the mandate of the Supreme Court." Jurisdiction, however, was otherwise retained. (Pet. App. 70a to 71a). On October 24, 1986, the Tax Court submitted its recommendations which addressed pertinent legal issues that needed to be resolved before an accounting of preempted expenditures was performed. (Pet. App. 39a to 69a). Notably, the Tax Court recommended that the

decision of the Supreme Court of the United States be applied retroactively to the dates of the adoption of the NCP and the NPL -- the regulatory "yardsticks" used by this Court to determine those categories of expenditures that "may be compensated" by Superfund. The Tax Court also found as a matter of state law that the preempted purposes of the Spill Act were severable from the remainder of the statute. Specifically, the Tax Court concluded that the non-preempted purposes were identifiable and were "in no way dependent on the excised portions." (Pet. App. 61a). The Tax Court also suggested that, following an accounting to determine all preempted expenditures made by the Spill Fund, the New Jersey Legislature should be given a reasonable period of time in which to reimburse the Fund for the improper expenditures.

The Supreme Court of New Jersey affirmed these recommendations with modification. Notably, that court fully accepted this Court's determination that "the tax levied by the Spill Act was imposed for certain purposes that were preempted by CERCLA, as well as for other purposes not preempted by CERCLA," as the basic premise of its opinion. 109 N.J. at 113. It thereafter recognized that, "the Spill Act was preempted by §114(c) of CERCLA to the extent that the Act authorized expenditures, beyond the mandatory state share, 'for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP.'" 109 N.J. at 117, quoting Exxon Corp. v. Hunt, 475 U.S. at 376. Indeed, the opinion on remand demonstrated that the New Jersey Supreme Court examined this Court's opinion carefully, quoted from it liberally, and viewed the entire remand squarely in light of the conclusions reached by this Court. See, e.g., 109 N.J. 110. (Pet. App. 15a to 38a).

The first issue addressed by the New Jersey Supreme Court was severability which it found to be warranted as

"manifestly consistent with the legislative intent" of the Spill Act. 109 N.J. at 121. The court further found that the Spill Act "makes sense" with or without the preempted purposes, and thus should stand as a matter of state law despite the portions excised by this Court in Exxon Corp. v. Hunt, 475 U.S. at 374-376. Id. In reaching this conclusion, the New Jersey Supreme Court rejected petitioners's claims that severability was inappropriate because all of the statutory objectives had been financed by the same tax rate. Id. at 118.

The New Jersey Supreme Court next addressed the period and scope of preemption, endorsing the Tax Court's recommendation that the adoption of the NCP and NPL marked the critical dates on which preemption should be deemed to commence. Id. at 120. This finding was based explicitly upon this Court's determination that the NCP and NPL furnished the "appropriate test" for determining preemption. Id. at 126, quoting 475 U.S. at 374. Next, the New Jersey Supreme Court established October 17, 1986 -- the date SARA was enacted and §114(c) of CERCLA was repealed -- as the end date of preemption. After establishing these backward-looking parameters, the court remanded the case once again to the Tax Court for an accounting to determine the exact amount of Spill Fund expenditures preempted by CERCLA. Id. at 126-27.

As to remedy, the court endorsed most of the Tax Court's recommendations as responsive to the peculiar circumstances of this case where the Spill Tax was only partially invalidated, and even that partial invalidation was only for a limited time. Id. at 128. After analyzing the projected needs of the Spill Fund for non-preempted uses, recent legislative amendments to the Spill Act increasing the Fund's tax base, and the congressional repeal of §114(c), the court concluded that, "In our view, reimbursement of the Spill Fund from non-Spill Act revenues vindicates the Spill Fund's payment of preempted expenses in a manner

most consistent with the objectives of Congress and the Legislature." Id.at 132. The New Jersey Supreme Court then remanded the case back to the Tax Court for further proceedings. Id.

**4. This Petition.**

As a result of that decision, these petitioners sought a writ of mandamus from this Court to the Supreme Court of New Jersey for allegedly violating this Court's mandate in Exxon v. Hunt, 475 U.S. 355 (1986), by denying them a refund of the preempted state taxes. That mandamus petition was denied on March 28, 1988. 485 U.S. 975. Petitioners then moved for summary judgment before the Tax Court seeking an order mandating a full refund of Spill Fund taxes attributable to preempted purposes, contending that this Court's recent decision in McKesson required a modification of the remedy fashioned by the New Jersey Supreme Court. The Tax Court denied this motion based on the "law of the case" doctrine. (Pet. App. 13a). The Appellate Division of the Superior Court of New Jersey affirmed on February 22, 1993, addressing the applicability of McKesson on the merits, however, and finding McKesson not to require anything further than the remedy already provided by the Supreme Court of New Jersey. Exxon v. Hunt, supra, 262 N.J. Super. at 268-70 (Pet. App. 5a to 7a). Petitioners now seek review from this Court for a third time.[1]

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[1] This petition actually represents Exxon's fourth request for review by this Court. See also, Exxon v. Hunt, 11 ELR 20,886 (D.N.J. 1981)(finding the proper forum for Exxon to bring its claim in the first instance to be state court), aff'd 683 F.2d 69 (3d Cir. 1982), cert. denied 459 U.S. 1104 (1983).

## REASONS FOR DENYING THIS PETITION

This petition for a writ of certiorari should be denied because the Supreme Court of New Jersey, on remand, fully carried out the mandate of this Court in Exxon v. Hunt and, furthermore, crafted a remedy that is in full accord with this Court's subsequent ruling in McKesson. The precedents of this Court clearly hold that the remedy for an unlawful tax is governed by state law and has historically been left to the state courts to decide as long as constitutional requirements -- met here -- are satisfied. Those principles would be promoted by denying this petition. In addition, this matter involves a narrow issue, affecting few, which is most "unlikely to recur," because the provision of CERCLA preempting certain state actions was repealed by Congress in 1986. After thirteen years of litigation,[2] it is time for this matter to come to rest.

### I. The Remedy Ordered By The New Jersey Supreme Court Is Consistent With The Requirements Established By This Court In McKesson.

The Appellate Division below, despite petitioners's contentions to the contrary, did not "ignore" McKesson but thoroughly addressed it and found that "[t]he logic of McKesson as applied to this case is that if a workable means for curing the pre-emption impairment of the Spill Fund tax short of a refund is employed, then the plaintiffs' constitutional right to an effective remedy will not have been violated." 262 N.J. Super. at 268. (Pet. App. 5a). Since just such a "workable means" was ordered by the

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[2] See 4 N.J. Tax 294 (1982); 190 N.J. Super. 131, 462 A.2d 193 (App. Div. 1983); 97 N.J. 526, 481 A.2d 271 (1985); 475 U.S. 355 (1986); _ N.J. Tax _ (1986); 109 N.J. 110 (1987); 485 U.S. 975 (1988); _ N.J. Tax _ (1991)(Pet. App. 10a); 620 A.2d 1068, 262 N.J. Super. 264 (N.J. Super. A.D. 1993) certif. denied 133 N.J. 445 (N.J. 1993).

New Jersey Supreme Court and implemented by the New Jersey Legislature when it reimbursed the Spill Fund for over $8 million in preempted expenditures, the mandate of McKesson for a "clear and certain" remedy was met here. Moreover, in framing their "question presented" and throughout their brief, petitioners have failed to recognize as well that the Spill Fund tax was only partially preempted, that the New Jersey tax itself was not beyond the power of the state to impose, that the state and federal legislation were not congruent but partially overlapped, that the petroleum and chemical industries were never immune from this tax, that the tax was perfectly valid if used for nonpreempted items and that states were never preempted by CERCLA from using general revenues to finance Superfund-type activities. Given the circumstances of this case, therefore, McKesson was properly applied below and further review by this Court is unwarranted.

**A. McKesson Does Not Require A Refund Where As Here The Tax Is Partially Valid.**

The decision below noted that McKesson emphasized the choice of options available to the state in remedying a discriminatory tax where, although the tax itself represents a valid exercise of state power, either its incidence or the manner in which it is administered results in disfavored treatment for certain persons and entities. 262 N.J.Super. at 268. (Pet. App. 5a). The Appellate Division found the Spill Fund tax similarly to be a valid exercise of state power that had been found to be overly broad, "subsuming objectives which were, for a time, preempted by federal law," and noted that the "United States Supreme Court held in this case that CERCLA expressly preempted the Spill Fund from being used" (emphasis in original) for parts of two of its six purposes except to the extent of providing the 10% state share of remedial costs. Id. at 269 (citations omitted). (Pet. App. 6a). The court also noted that the other four purposes of the Spill Fund were expressly held

by this Court not to have been preempted and that the taxes paid by the petitioners during the period of preemption were "presumptively valid as levies to fund those Spill Fund objectives that were determined not to have been preempted by federal law." Id. at 269 (citations omitted).

The remedy crafted by the court below authorized refunds to petitioners only if the New Jersey Legislature failed to reimburse the State Spill Fund, the recipient of the taxes paid by petitioners under the Spill Act, for all preempted expenditures made by the Spill Fund within six months of a final accounting of those preempted expenditures. The New Jersey Legislature reimbursed the Spill Fund in the amount stipulated to by the parties, $8,142,094, within the allotted time period. (Pet. App. 8a). Petitioners thus received no refunds, but a retrospective remedy was provided.

Thus, the petitioners have no enforceable claim to a refund as long as the Spill Fund revenues expended for preempted purposes during the limited period of preemption were returned to the Fund from general revenues during the time allotted. "This conclusion is of a piece with the United States Supreme Court's rationale in McKesson." Id. at 269-70. (Pet. App. 6a-7a). Since the New Jersey courts had already determined to apply a "clear and certain" remedy, McKesson requires nothing further. Nor is there anything novel about McKesson's treatment of a partially invalid tax that would require this Court to review the decision of the court below. For this Court stated unequivocally in McKesson that "[o]ur approach today ... is rooted firmly in precedent dating back to at least early this century." 496 U.S. at 32-33. And since the New Jersey Supreme Court's crafting of a remedy satisfies that line of precedent, including McKesson, further review is unwarranted.

Contrary to petitioners's characterization, statutory construction, not tax refunds, has been the primary focus of this litigation. This Court never contemplated a tax refund in the unique circumstances of this partial preemption case and made no reference to the question of refunds in its opinion,[3] 475 U.S. 355-77, but left the State with the duty, as is its custom after invalidating a state tax scheme, "of crafting appropriate relief." McKesson, 496 U.S. at 32, n. 16. See also American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 176 (1990) ("When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding ... and have entrusted state courts with the initial duty of determining appropriate relief."); Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2519 (1993) (finding state must apply remedy retroactively to the tax years at issue in petitioners's refund action, and thereby reversing judgment below, but refraining from entering judgment for petitioners "because federal law does not necessarily entitle them to a refund."); James B. Beam Distilling Co., v. Georgia, 111 S. Ct. 2439 (1991) (finding that once a rule is to apply retroactively "the remedial inquiry is one governed by state law."). The Spill Act Tax preempted here is analogous to the tax found to violate the Commerce Clause in McKesson in that it was only partially preempted and it was well within the State's power to apply; the tax was merely overbroad and needed adjustment. Thus, the discussion of the flexibility afforded to state courts and state governments to remedy state taxes in McKesson is equally applicable here.

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[3]Justice Stevens did, however, discuss refunds in his dissent, but he believed that the "judgment of the Supreme Court of New Jersey should be affirmed" in its entirety. 475 U.S. at 386, 376. He also wrote, "If the New Jersey courts were to hold that the proscribed purposes were severable from the permissible ones, appellants would be entitled to no refund." Id. at 385, n. 10.

Petitioners erroneously claim that the remedy crafted by the New Jersey Supreme Court according to the mandate of this Court is inadequate because this Court's decision in McKesson requires a refund of all tax money that was collected pursuant to the Spill Act. (Pet. Brief at 15). McKesson, far from requiring a tax refund, clearly articulates the flexibility available to the state in crafting a remedy for an invalid tax. 496 U.S. at 40. Much as the New Jersey Supreme Court did here, this Court suggested in McKesson that a viable alternative to refunds to the taxpayers would be a retroactive adjustment of the tax base that would eliminate the effects of the illegal portions of the tax. Specifically, McKesson suggested that the illegal portions of the tax could be rectified by "a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce..." Id.

This Court suggested possible remedies that would least impair state finances while still satisfying the demands of due process, but made clear that the choice of remedy was to be left to the state to decide. This could be accomplished, it suggested, by taking remedial action in order to erase the effects of the invalid portions of the tax. Specifically, the Court instructed Florida that it could achieve compliance with Due Process if it were to:

> reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive

> petitioner of its property pursuant to a tax scheme that is valid under the Commerce Clause. [Id. at 40].

Thus, McKesson does not necessarily require a refund to the taxpayer, as petitioners assert, but allows a post-deprivation remedy designed to eradicate the effects of the illegal tax by retroactively reformulating it, with the State retaining the revenue. See Id. at 40-41.

Indeed, the remedy suggested by McKesson as an adequate means to satisfy the requirements of due process is remarkably similar to the remedy mandated here. McKesson required that the taxpayer assessed in that case under an unconstitutional tax must receive some form of retrospective relief, not just prospective relief -- the same conclusion that the Tax Court of New Jersey had reached three years earlier, and the conclusion that was endorsed by the New Jersey Supreme Court. See Exxon v. Hunt, 109 N.J. at 113. However, nowhere in its opinion in McKesson did this Court say that a refund was the only kind of retrospective relief available to the State.

A review of this Court's subsequent cases citing McKesson illustrates that McKesson does not require a refund. On the contrary, it has been cited for its recognition of the flexibility accorded to states to craft a remedy for an improper state tax, according to state law, as long as it complies with minimum federal standards. See Harper, supra, 113 S.Ct. at 2519 (citing McKesson for the proposition that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."); American Trucking, supra, 496 U.S. at 176 ("While the relief provided by the State [for remedying an unconstitutional tax] must be in accord with federal constitutional requirements, see McKesson (citations omitted), we have entrusted state courts with the initial duty of determining appropriate relief.").

McKesson made clear that as long as due process is guaranteed the remedy for a preempted state tax is a matter of state law.

Although its decision predated McKesson, the relief given to petitioners by the New Jersey Supreme Court here is at least as extensive as the relief deemed sufficient by this Court in McKesson. The parallels between the remedy created by the New Jersey Supreme Court and the remedy described by this Court in McKesson are obvious. Like this Court, the New Jersey Supreme Court started with the proposition that a taxpayer who pays a partially invalid tax is entitled to meaningful backward-looking relief. See Exxon Corp. v. Hunt, supra, 109 N.J. at 128. Here, as this Court suggested as one remedy in McKesson, the effects of a partially invalid tax were corrected through a retroactive adjustment to the Spill Fund. McKesson, supra, 496 at 31, 40; Exxon Corp v. Hunt, supra, 109 N.J. at 129-132.

Petitioners, however, artificially distinguish McKesson by arguing that such alternatives to a total refund cannot be applied to a tax that is partially preempted, but only to a tax that is partially invalid because it is "discriminatory." Since some of the uses of the tax here were invalid because they were preempted, rather than because they violated the restrictions against State regulation of interstate commerce, petitioners conclude that McKesson gives them an absolute right to a refund of the entire amount paid. Petitioners offer no rationale for such a distinction, and, indeed, there is no legal basis for their contention that the valid portions of a tax that has some unconstitutional provisions can be rescued through a retroactive adjustment only when the tax discriminates against the right to engage in interstate commerce.

The primary significance of the fact that the tax reviewed in McKesson was partially invalid because it was

discriminatory was that there remained a portion of the tax that was validly collected, and which therefore was within the power of the state to impose. Id. at 40. The Court went on to distinguish this partial invalidation from other cases in which the tax "was beyond the State's power to impose," or was invalid "because the taxpayers were absolutely immune from the tax..." Id. at 39. In such instances, where the state totally lacked the power to impose such a tax, "no corrective action by the State could cure the invalidity of the tax during the contested tax period." Id. Thus, it is clear that, while a totally unconstitutional or ultra vires tax would have to be refunded because the defects in its levy and collection could never be corrected, McKesson still gives the state the opportunity to correct a defect by retroactively restructuring a partially valid tax by eliminating the effects of the invalid portions.

It was not beyond the power of the State of New Jersey to impose a tax on the petroleum and chemical industries pursuant to the Spill Act. CERCLA did not preempt state taxes on the petroleum and chemical industries, nor dictate that these industries were altogether immune from any taxation. CERCLA merely worked a partial preemption of two of the six uses of the Spill Fund. Effective relief was crafted by the New Jersey Tax Court and the Supreme Court of New Jersey: legislative action refunding money used for preempted expenditures to the Spill Fund. The conclusion is inescapable that the decision of the New Jersey Supreme Court granted a "clear and certain" remedy constituting "meaningful backward-looking relief," 496 U.S. at 31-32, that is consistent with McKesson.

**B. The Equitable Discretion Language of McKesson Is Relevant Only To Retrospective Relief And the Petitioners Have Already Been Afforded That Relief.**

Petitioners misconstrue McKesson further, arguing that the New Jersey courts have "ignored" this Court's ruling which precludes the exercise of equitable discretion where a preempted tax is involved. This Court made no such ruling, but found only that neither of the two equitable considerations cited by the Florida Supreme Court for providing petitioners with prospective relief were sufficient to override the constitutional requirement in that case to provide retrospective relief. 496 U.S. at 44. But the Court also found that the state may weigh such equities when choosing "between the various avenues of relief open to it." Id. at 51. In Beam v. Georgia, supra, a case applying retroactivity to a similar situation, this Court wrote that "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." 111 S.Ct. at 2448. Thus, McKesson cannot be interpreted, as Exxon insists, to preclude courts from considering the equities when selecting the remedy for the violation of a constitutional rule. In discussing McKesson, in Beam v. Georgia, this Court explained that McKesson cannot be read as Exxon insists:

> Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which McKesson did not deal. [Id.]

This discussion of equities may be entirely irrelevant, however, because the equitable considerations language of McKesson goes only to the issue of retrospective relief, and

the New Jersey Supreme Court provided retrospective relief when it formulated the remedy in this case.

## II. The Determinations Of The Supreme Court Of New Jersey On Remand Are Completely Consistent With The Mandate Of This Court.

Petitioners allege that "New Jersey should be ordered in accordance with the mandate of Hunt to refund all Spill Fund taxes paid by petitioners." (Pet. Brief at 15). Despite petitioners's protestations to the contrary, this Court did not mandate a refund in Hunt nor was such a remedy ever contemplated by this Court. As American Trucking, McKesson, Harper, and Beam hold repeatedly, the remedy for an unlawful tax is not necessarily a refund, nor is it traditionally decided by this Court; the remedy for this partially preempted state tax is governed by state law.

Equally erroneous is petitioners's allegation that the crucial premise of the New Jersey courts on remand was that "Hunt held that Section 114(c) preempted only expenditures from the fund for an impermissible purpose and not the imposition of the tax." (Pet. Brief at 13). The remedial parameters established by the Supreme Court of New Jersey were based upon and derived from the judgment of this Court in Exxon Corp. v. Hunt. The very starting point of analysis was the determination by this Court that CERCLA partially preempted two of the six uses to which the entire Spill Act Tax could be put. Although this Court held that the actual expenditures made by the Spill Fund were irrelevant for determining what §114(c) meant, nothing in the opinion of this Court supports petitioners's position that expenditures are irrelevant for the purpose of remedy. In fact, the finding of partial preemption, tailored as it was to sites on the NPL and to emergency response actions covered by the NCP, actually

invites concentration on preempted expenditures as the most reasonable and practical way to establish an equitable remedy. The Supreme Court of New Jersey thus reasonably decided that the monetary amount of any remedy should be equal to the amount of expenditures actually made for preempted uses. As to the period of preemption, here too the Supreme Court of New Jersey relied upon this Court's ruling that the proper test of Superfund eligibility was the NCP, including the NPL. It consequently used the promulgation dates of those regulations as the starting dates for calculating all preempted expenditures. Such an approach is completely consistent with this Court's finding of partial preemption, and also flows from the decision of the Supreme Court of New Jersey that the non-preempted uses of the Spill Act were sufficient to support the original tax rate.

Petitioners assert, nevertheless, that the entire tax must fall because it contains a single tax rate which cannot be severed. Had this been this Court's view, presumably it would have said so, thereby concluding the matter without the necessity of a remand. Plainly, this Court's holding of partial preemption, focusing on expenditures for preempted purposes rather than upon tax collections, amply justifies looking beyond the tax rate to expenditures by the Spill Fund.

The remedy devised by the Supreme Court of New Jersey, giving the New Jersey Legislature the opportunity to reimburse the Spill Fund from general revenues for all expenditures made in violation of CERCLA's preemption clause, takes full account of the partial preemption found by this Court and redresses any injury caused by the improper expenditure of Spill Fund moneys.

## CONCLUSION

For all of the foregoing reasons, the State of New Jersey requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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